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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 833

UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioner,

vs.

MARIE L. HILL,

Respondent.

On Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court for the Middle District of Florida, dated September 12, 1967, dismissing the Uniform Amended Complaint, is reported at 272 F. Supp. 569. The opinion of that Court, dated January 9, 1968, dismissing the Second Uniform Amended Complaint is unreported. The opinion of the Court of Appeals for the Fifth Circuit reversing the District Court is reported at 428 F.2d 112.

Restatement of Question Presented

Whether the decision of the Court of Appeals for the Fifth Circuit upholding the sufficiency of a complaint by a hotel guest against the hotel's public liability, fire, and workmen's compensation insurer is in conflict with applicable Florida law, the gravamen of the complaint being that the hotel paid for and relied upon the insurer to perform safety engineering inspections of the hotel, that the insurer negligently performed such inspections and that as a result of such negligence, the guest suffered injury and damage.

Argument in Opposition to Granting the Writ

1.

The decision of the Court of Appeals is not contrary to Florida law.

The petitioner candidly admits that "There is no Florida case directly on point" (Petition p. 4), and that the amendment to the Florida Workmen's Compensation Act relating to third-party actions by an employee against his employer's compensation insurance carrier, which became effective July 1, 1970, "would not of itself constitute a bar to the action" (Petition p. 6). The petition, therefore, shows on its face that there is no conflict between the decision of the Court of Appeals and any applicable Florida decisional or statutory law that would justify review by this Court under its Rule 19(1)(b) and that there are no circumstances that would cause this Court to depart from its general policy to accept the determination of state law by the Court of Appeals. *Helvering* v. *Stuart*, 317 U.S. 154, 63 S.Ct. 140, 87 L.Ed. 154; *Huddleston* v. *Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246; *Spiegel's Estate* v. *Commissioner of Internal Revenue*,

335 U.S. 701, 69 S.Ct. 301, 93 L.Ed. 330; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520; *General Box Company* v. *United States*, 351 U.S. 159, 76 S.Ct. 728, 100 L.Ed. 1055; *Propper* v. *Clark*, 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 877, 94 L.Ed. 1194; *Sims* v. *United States*, 359 U.S. 108, 79 S.Ct. 641, 3 L.Ed.2d 667; *C.I.R.* v. *Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886.

2.

The decision of the Court of Appeals is in accord with the decisional law of Florida.

The opinion of the Court of Appeals demonstrates that it carefully weighed all pertinent decisional law, including the two Florida cases cited by the petitioner (Petition pp. 5-6), in holding that the complaint stated a claim upon which relief can be granted.

The Court of Appeals started with an analysis of Section 324A, Restatement of Torts 2d (1965), which states the generally accepted applicable rule of law;[1] then discussed the *Nelson*[2] litigation in which the Illinois Appellate Courts were

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1. The Florida Appellate Courts have frequently followed the Restatement of Torts in the absence of controlling Florida precedent. *Sterling* v. *Hawkesworth* (Fla.App. 3d Dist. 1962), 139 So.2d 740; *Propper v. Kesner* (Fla. 1958), 104 So.2d 1; *Matthews* v. *Lawnlite Company* (Fla. 1956), 88 So.2d 299; *Cockerham* v. *R. E. Vaughan* (Fla. 1955), 82 So.2d 890; *Wilensky* v. *Perell* (Fla. 1954), 72 So.2d 278; *Mallory* v. *O'Neil* (Fla. 1954), 69 So.2d 313; *Satin* v. *Hialeah Race Course* (Fla. 1953), 65 So.2d 475; *Eli Witt Cigar & Tobacco Co.* v. *Matatics* (Fla. 1951), 55 So.2d 549; and *Lehman* v. *Goldin* (1948), 160 Fla. 710, 36 So.2d 259.

2. *Nelson* v. *Union Wire Rope Corp.* (Ill. App. 1963), 187 N.E.2d 425; *reversed, Nelson* v. *Union Wire Rope Corp.* (Ill. 1964), 199 N.E. 2d 769.

confronted with a similar problem in determining Florida law, and the *Modlin*[3] and *Gallichio*[4] cases in which Florida appellate courts cited with approval the opinion of the Supreme Court of Illinois in *Nelson;* then discussed numerous other Florida decisions bearing upon the issues involved. It easily distinguished the two Florida cases relied upon by the petitioner here (*Reed* v. *Black Caesar's Forge Gourmet Restaurant* (Fla.App. 3d Dist. 1964), 165 So.2d 787, and *American Box & Lumber Co.* v. *Chandler* (Fla. 1931), 102 Fla. 907, 138 So. 29) in which there were no allegations of reliance. See 428 F.2d at 117, note 7.

On the basis of the decisions cited and discussed in its opinion, the Court of Appeals was clearly justified in holding that under applicable Florida law the complaint stated a claim upon which relief can be granted.

3.

The 1970 Amendment to the Florida Workmen's Compensation Act providing that the employer's workmen's compensation carrier shall not be liable for its performance of safety engineering services in a thirty-party action by an employee is inapplicable.

The amendment of the Florida Workmen's Compensation Act,[5] which became effective July 1, 1970, providing that the employer's workmen's compensation insurance carrier shall not be liable for its performance of safety engineering serv-

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3. *Modlin* v. *Washington Avenue Food Center* (Fla.App. 3d Dist. 1965), 178 So.2d 596, *affirmed sub. nom. Modlin* v. *City of Miami Beach* (Fla. 1967), 201 So.2d 70.

4. *Gallichio* v. *Corporate Group Service, Inc.* (Fla.App. 3d Dist. 1969), 227 So.2d 519.

5. A copy of the text of the legislative enactment is included in the Appendix to this brief.

ices in third-party actions by employees, can have no application to the present case because it is limited to third-party actions by employees under the Florida Workmen's Compensation law. It has no retroactive effect because there is no showing of intent by the Legislature to give it such effect. *Greene* v. *United States* (1964), 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576; *State* v. *Green* (Fla. 1958), 101 So.2d 805; *Indemnity Ins. Co.* v. *Brooks-Fisher Insulating Co.* (Fla.App. 2d Dist. 1962), 140 So.2d 613. Moreover, it cannot be construed to be applicable in other types of actions because, being in derogation of the common law, it will not be extended by implication.

> "Under Fla. Stat. § 2.01, F.S.A. the Common Law of England is expressly made a part of the law of Florida provided it is not inconsistent with the constitution and laws of this state. This existing common law may, of course, be superseded or modified by statute; but statutes in derogation of the common law must be strictly construed. Southern Attractions, Inc. v. Grau, Fla.1957, 93 So.2d 120; Clark v. State, Fla.App.1959, 114 So.2d 197, 80 A.L.R.2d 261. A statute will not be held to have changed well settled common law principles by implication, unless the implication of change is clear or necessary to give full force to express provisions of the statute and the public policy thus established. Dudley v. Harrison, McCready & Co., 1937, 127 Fla. 687, 173 So. 820, reh. den., 128 Fla. 338, 174 So. 729. A statute will not be construed as taking away common law rights unless the pre-existing right is repugnant to the statute. Cullen v. Seaboard Airline Ry. Co., 1912, 63 Fla. 122, 58 So. 182."
>
> *In Re Levy's Estate* (Fla.App.2d Dist. 1962), 141 So.2d 803, 805.

The passage of this statute was brought to the attention of the Court of Appeals in the petition for rehearing. Contending that the Court of Appeals had misapprehended the Florida law, the petition for rehearing stated:

> "Indicative of this is the fact that almost contemporaneously with the rendering of the decision (while not known to the court at the time of preparing its opinion), the Florida Legislature adopted into law an act reflecting the public policy of the State of Florida to be just the opposite of the philosophy expressed in the opinion."
>
> Petition for Rehearing pp. 1-2.

The Court of Appeals properly rejected this contention and denied the petition for rehearing (428 F.2d at 121).

CONCLUSION

For these reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

WORKMEN'S COMPENSATION—EXCLUSIVENESS OF LIABILITY

Chapter 70-25

SENATE BILL NO. 583

An Act relating to workmen's compensation; amending Section 440.11, Florida Statutes, extending the exclusiveness of liability of an employer to his insurance carrier, service agent, or safety consultant by limiting their liability as a third party; providing an efective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 440.11, Florida Statutes is amended to read:

440.11 Exclusiveness of liability

(1) The liability of an employer prescribed in Section 440.10, Florida Statutes, shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter an injured employee, or his legal representative, in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the

injury was due to the contributory negligence of the employee.

(2) Any employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tort-feasor for assisting said employer in carrying out said employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultive service or other safety service incidental to the workmen's compensation or employers' liability coverage or to the workmen's compensation or employers' liability servicing contract; provided the exclusion from liability under this subsection shall not apply in any case where injury or death is proximately caused by the willful and unprovoked physical aggression or by the negligent operation of a motor vehicle by employees, officers or directors of the workmen's compensation carrier, service agent, or safety consultant of said employer.

Section 2. This act shall take effect July 1, 1970.

Became a law without the Governor's approval.

Filed in Office Secretary of State May 14, 1970.